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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
-----x
In re
Case No.
WORLD COM, INC., et al, 02-13533
Reorganized Debtors.
-----x
January 17, 2006
11:50 a.m.
United States Custom House
One Bowling Green
New York, New York 10004

DIGITALLY RECORDED PROCEEDINGS
(E X C E R P T)

11:45 WORLD COM, INC., ET AL
WorldCom's Motion for Summary Judgment
Against Parus Holdings, Inc.'s,
Successor-By-Merger to EffectNet, Inc. and
EffectNet, LLC.
Opposition by Parus Holdings, Inc. filed.
Debtors' Motion to Strike Portions of
Affidavits Submitted in Support of Claimant
Parus Holdings, Inc.'s Response and
Opposition to WorldCom's Motion for Summary
Judgment.
Opposition by Parus Holdings, Inc. filed.
B E F O R E:
THE HONORABLE ARTHUR J. GONZALEZ
United States Bankruptcy Judge

DEBORAH HUNTSMAN, Court Reporter
198 Broadway, Suite 903
New York, New York 10038
(212) 608-9053 (917) 723-9898

1

2 A P P E A R A N C E S:

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12 BY: ROBERT S. FRIEDMAN, ESQ.

13 -and-
14 KEVIN J. SMITH, ESQ.

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2 (Whereupon, the following is an
3 excerpt from 1/17/06 in re Worldcom, et al,
4 Case No. 02-13533.)

5 JUDGE GONZALEZ: Please be seated.

6 The Debtors' Motion for Summary
7 Judgment.

8 MR. DRISCOLL: Thank you, Your
9 Honor. Robert Driscoll for the Debtors.

10 JUDGE GONZALEZ: All right. Go
11 ahead.

12 MR. DRISCOLL: Your Honor, in this
13 proceeding Claimant Parus Holdings asserts
14 two claims. First is for breach of contract
15 against WorldCom's wholly-owned subsidiary
16 Intermedia, and the second is against both
17 WorldCom and Intermedia, asserting various
18 consequential damage claims premised on
19 WorldCom and Intermedia's asserted acting in
20 concert to breach the same contract.

21 The contract involved in both
22 claims is a November 2000 contract between
23 EffectNet, the predecessor of Claimant Parus
24 Holdings, and Intermedia. It is attached as
25 Exhibit A to our moving papers. Under this

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2 contract, Intermedia agreed to buy voice
3 messaging services from EffectNet for resale
4 by Intermedia to end users. Under section
5 2.12 of the contract, Intermedia was
6 obligated to have resold EffectNet's services
7 to 10,000 end users by December 18, 2001,
8 and, if Intermedia failed to meet this 10,000
9 resale quota, it then became liable under
10 section 2.13 of the contract for numeric
11 shortfall times what the contract describes
12 as the "base monthly price." This is called
13 a "Reconciliation Payment" in the contract.
14 There is no dispute that Intermedia defaulted
15 on its resale and Reconciliation Payment
16 obligations for December 2001 through March
17 of 2002.

18 On the breach of contract claim
19 that is pending, only two issues, I believe,
20 need to be resolved. The first is the number
21 of Reconciliation Payments Intermedia owes;
22 four are acknowledged by the Debtors and 24
23 are sought by Parus Holdings. The second
24 issue is the amount of the base monthly price
25 that is used to calculate the monthly

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2 Reconciliation Payments. Here the choice is
3 between the basic, and that is a quote,
4 monthly service price of \$11.45, which is
5 contended by the Debtors as being
6 appropriate, or the unlimited monthly service
7 price of \$27.40 as contended by Parus
8 Holdings. We believe that both issues can be
9 resolved by the Court through application of
10 the contract terms to the undisputed facts.

11 Starting with the first issue, the
12 number of Reconciliation Payments Intermedia
13 was required to make, this question hinges on
14 whether the contract and the parties'
15 obligations under it were terminated on April
16 12, 2002, 30 days after EffectNet gave notice
17 of written default to Intermedia. Section
18 5.2 of the contract entitled "Termination"
19 provides that in the event of a contractual
20 default, the contract can be terminated by
21 giving a written notice of default to the
22 defaulting party. It also specifies that the
23 contract does terminate and will be effective
24 30 days after such notice, if the defaulting
25 party fails to cure its defaults. As already

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2 stated, it is undisputed that Intermedia was
3 in default to make the Reconciliation
4 Payments for four months, ending March of
5 2002, and it is also undisputed that under
6 section 5.2 of the contract that general
7 counsel of EffectNet did give written notice
8 of default to Intermedia on March 12, 2002.
9 That is Exhibit D to our motion. As general
10 counsel of EffectNet, Mr. McConnell
11 subsequently explained to WorldCom -- and
12 this is in Exhibit E to the pending motion --
13 on March 25th, he had given written notice of
14 default to EffectNet pursuant to section 5.2
15 of the contract, on March 12th, that section
16 5.2 of the contract provides that the
17 contract will terminate 30 days after such
18 notice, if default is not cured. Then he
19 advised WorldCom -- and this is a quote and
20 it appears on Exhibit E to our motion --
21 quote, "accordingly, the agreement will be
22 terminated for default by Intermedia on or
23 about April 12, 2002 if the Intermedia
24 defaults are not cured prior thereto."
25 Finally, all parties acknowledge that

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2 Intermedia failed to cure its defaults within
3 that 30-day period. Accordingly, applying
4 the plain terms of section 5.2 of the
5 contract to these admitted facts, the
6 contract terminated on April 12, 2002. A
7 ruling by this Court that the contract was
8 terminated on that date would be consistent
9 with the contemporary explanation by
10 EffectNet's general counsel to WorldCom.
11 Similarly, a ruling by this Court that the
12 contract was terminated on April 12, 2002,
13 would be consistent with EffectNet's
14 contemporaneous acts. After Intermedia
15 failed to respond to EffectNet's notice of
16 default, EffectNet ceased performing on the
17 contract. This is admitted by EffectNet.
18 Such a cessation of performance is
19 specifically authorized under section 5.3 of
20 the contract, when the contract is terminated
21 for any reason.

22 The consequences, Your Honor, of
23 contract termination are significant. After
24 termination, Intermedia has no ongoing
25 obligation to continue paying EffectNet the

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2 Reconciliation Payments provided for under
3 section 2.13 of the contract. As specified
4 in paragraph 6 of the contract captioned
5 "Survival," none of the party's obligations
6 provided for in section 2 of the contract
7 survive its termination, and this includes
8 the obligation to pay Reconciliation Payments
9 under section 2.12. The result is also
10 consistent with section 5.3 of the contract,
11 which provide for what obligations the
12 parties do remain liable for upon termination
13 of the contract. Those are obligations that
14 accrued before the date of the termination.

15 Finally, Your Honor, on this point,
16 it is made clear in section 11 of the
17 contract which did survive termination, that
18 neither party to the contract shall be liable
19 to the other for any type of damages or at
20 least for the type of damages that Parus
21 Holdings seeks from Intermedia in this
22 proceeding. In section 11, the parties
23 provided that in no event shall either party
24 be liable to the other for -- now, this is a
25 direct quote -- "for any incidental,

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2 indirect, special, punitive, consequential,
3 or similar damages of any kind, including
4 without limitation, loss of profits, loss of
5 business, or interruption of business.

6 Parus Holdings seeks to avoid these
7 results and seeks to avoid summary judgment
8 by arguing that limiting Parus Holdings'
9 recovery to the four Reconciliation Payments
10 that are due before or were due before April
11 12, 2002, somehow deprive it of the benefit
12 of its bargain. We disagree. To the
13 contrary, it seems quite obvious from the
14 contract provisions that we just discussed,
15 the parties in forming this contract
16 bargained to put boundaries around their
17 potential liabilities to each other. This is
18 made, I believe, or evident by the penalty
19 provision of the contract which is section
20 5.4, where had Intermedia -- not EffectNet --
21 terminated the contract early, Intermedia
22 would have been liable for a maximum of one
23 half of the 24 months of Reconciliation
24 Payments Parus Holdings now seeks. Parus
25 Holdings also seeks to avoid summary judgment

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2 through the affidavit and statements of the
3 former general counsel of EffectNet, who is
4 now general counsel of Claimant Parus
5 Holdings, Robert McConnell. He, as I stated
6 earlier, was the author of the March 12, 2002
7 notice of default to Intermedia and the
8 author of the March 25, 2002 letter to
9 WorldCom explaining the consequences of
10 Intermedia's default and failure to cure, and
11 that being termination of the contract on
12 April 12th.

13 Now, in this Court Mr. McConnell
14 has filed an affidavit four years after the
15 fact, in which he states that he did not
16 intend in 2002 to terminate the contract. We
17 submit, Your Honor, that quite obviously the
18 best evidence of what Mr. McConnell intended
19 to do by his actions in 2002 are the words he
20 then used to describe the effect of the
21 default notice that he sent. Quite clearly,
22 he explained in 2002 that failure to cure by
23 Intermedia on or about April 12, 2002 would
24 work a termination of the contract. Under
25 the best evidence rule and the other

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2 authorities cited in our related motion to
3 strike, we believe Mr. McConnell's after the
4 fact contradictory and self-serving
5 statements should be disregarded by the Court
6 in its evaluation of this summary judgment
7 motion.

8 Turning now to the amount owed by
9 Intermedia for the Reconciliation Payments
10 that it did not make is already noted.
11 Section 2.13 of the contract, the amount of
12 the Reconciliation Payments is a function of
13 what it has described in the contract as the
14 base monthly price of EffectNet's service
15 times the numeric shortfall of end users
16 resold by Intermedia as measured against the
17 10,000 per month quota. There is no dispute
18 as to the written numeric shortfalls for the
19 months of December 2001 through March of
20 2002. They are, as set forth in the table
21 appearing at page 17 of Debtors' initial
22 summary judgment. The only dispute is
23 whether the base monthly price of EffectNet's
24 service was the price of EffectNet's basic
25 service or, as contended by Parus Holdings, a

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2 \$27.40 price of unlimited service. Both of
3 these pricing options are described in
4 appendix P of the contract at issue. We
5 believe that based on the plain language in
6 the contract, the \$11.40 per month price of
7 basic service is the appropriate contractual
8 reference point for ascertaining the base
9 monthly price. Ignoring the plain language,
10 we believe, of the contract, Parus Holdings
11 contends that the unlimited service price is
12 really the base monthly price.

13 In addition to being at grammatic
14 odds with the contractual term base, Parus
15 Holdings' contention, I believe, is
16 inappropriately supported by the evidence it
17 offers outside the contract itself, and that
18 consists of its present CEO Mr. Reneau, who
19 in his affidavit frequently states the
20 conclusion that the unlimited price of \$27.40
21 was what the parties intended to be used for
22 the base monthly price. These, however, are
23 ultimate conclusions, and they are not proper
24 statements to support an evidentiary fact
25 finding in summary judgment. Rule 56(e) of

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2 the Federal Rules, I think, makes this
3 perfectly clear. In the words of the rule,
4 ultimately and conclusory facts cannot be
5 utilized on a summary judgment motion.
6 Further, nowhere in Mr. Reneau's affidavit,
7 which is lengthy, does he advise that he
8 actually had firsthand experience or
9 involvement with the negotiation of the
10 contract at issue. He doesn't say he
11 negotiated it. He doesn't say he even
12 participated in the negotiation. Counsel's
13 comments in briefs say he did, but he doesn't
14 say that in his affidavit. Indeed, he didn't
15 even sign the contract. Accordingly, we
16 believe that Mr. Reneau's conclusory
17 statements ought not be regarded concerning
18 what is or what is not the appropriate base
19 monthly price to be applied by this Court.

20 In summary on the contract breach
21 issue, Your Honor, I believe that application
22 of the contract terms to the acknowledged
23 facts leads to three conclusions. First is
24 that the contract was terminated on April 12,
25 2002, 30 days after EffectNet gave written

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2 notice of default and Intermedia failed to
3 cure its default. Two, Intermedia has
4 liability to make Reconciliation Payments for
5 the shortfall for the period commencing
6 December 18, 2001, and concluding April 12,
7 2002. The third conclusion, I believe, is
8 that EffectNet's basic service price of
9 \$11.45 should be utilized as the multiplier
10 in determining what the amount of the
11 Reconciliation Payments is that are owed to
12 Intermedia. That is kind of a tortuous path,
13 but sometimes to construe contracts, you have
14 to go through that. I think the deficiencies
15 that we assert in Parus Holdings'
16 consequential damage claims can be dealt with
17 a bit more succinctly, because those
18 deficiencies relate to the principal elements
19 of the claims.

20 Starting off with Parus Holdings'
21 consequential damage claims against
22 Intermedia, all of those are barred by
23 section 11 of the contract between EffectNet
24 and Intermedia. As I already read into the
25 record, in section 11 the parties agreed to

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2 comprehensively limit their liability to each
3 other. They specifically agreed that in no
4 event would either be liable to the other
5 for, among other things, consequential
6 damages. As noted in our moving papers, such
7 a limitation provision is enforceable under
8 governing Arizona law, and the contract did
9 provide that Arizona law would control with
10 regard to the contract terms. As also
11 provided in the authority cited to the Court,
12 enforceability of such contractual
13 limitations are particularly appropriate in
14 commercial contracts, such as the one between
15 these commercial entities and are before your
16 Court.

17 In response, Parus Holdings argues
18 that enforcement of section 11 would leave it
19 without an adequate remedy. It also argues
20 that the provision itself is ambiguous,
21 because there is a blank in it. We believe
22 and advocate to the Court that neither
23 argument is available. Even when section 11
24 is fully enforced, Parus Holdings retains the
25 breach of contract claim and remedy that the

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2 parties bargained for, which is the payment
3 by Intermedia of the Reconciliation Payments
4 that it owed to EffectNet when the contract
5 terminated. As to the blank space creating
6 an ambiguity, Parus Holdings cites no
7 authority supporting that argument and, as
8 noted in our reply in this matter under
9 Arizona law, blank spaces in contracts don't
10 by themselves create an ambiguity or make the
11 provision unenforceable. Indeed, as pointed
12 out in one of those Arizona cases, the blank
13 space or the presence of a blank space simply
14 shows the absence of any agreement on that
15 particular subject. Here, section 11 is
16 fully capable of being enforced as written.
17 The blank, if filled in, would simply have
18 provided for an exception to the scope of the
19 liability limitation. No such exception was
20 inserted. The way it reads is, except for
21 damages arising under section blank, and then
22 it proceeds, in no event shall either party
23 be liable to the other for the various kinds
24 of damages I just mentioned.

25 Concerning Parus Holdings' civil

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2 conspiracy claim, as noted in our moving
3 papers -- and I don't think there is any
4 disagreement here -- a claim for civil
5 conspiracy cannot rest on proof of the
6 conspiracy alone. It must be accompanied by
7 evidence of acts in furtherance of the
8 conspiracy for a claim to lie. This is true
9 in all the state laws that are potentially
10 applicable to this matter. I don't think
11 Parus Holdings disputes this. But
12 significantly here, all of the acts that
13 Parus Holdings asserted were acts in
14 furtherance of the asserted conspiracy
15 occurring after the merger of WorldCom with
16 Intermedia effective July 2, 2002. This is
17 significant, we believe, because it is the
18 general rule that parent and wholly-owned
19 subsidiary corporations cannot be found to
20 have conspired with each other, because their
21 economic interests are such that they are
22 regarded as one entity.

23 The Supreme Court's decision in the
24 Copperweld case is the seminal decision in
25 this area. The multiple following decisions

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2 are initially cited, I believe, at page 10 of
3 our opening brief. In response, Parus
4 Holdings offers a handful of cases that had
5 not applied the Copperweld rationale outside
6 its original antitrust context. Those cases
7 are discussed in our reply brief, starting at
8 page 22. But for today's purposes, I think
9 it is sufficient simply to say, there are no
10 controlling cases that are contrary to
11 Copperweld. There are no better reasons and
12 more persuasively analyzed cases than the
13 Supreme Court's considering the inability of
14 a parent and a subsidiary corporation to
15 conspire with each other in an actionable
16 fashion. Accordingly, we believe the
17 conspiracy counterclaim should be summarily
18 rejected.

19 Parus Holdings' tortious
20 interference claim is, we believe, similarly
21 deficient. It is the general rule that a
22 parent corporation may not be held liable in
23 tort for interfering with a subsidiary's
24 contractual relations with a third party
25 under the same analysis as used by the

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2 Copperweld Court in saying that a conspiracy
3 claim won't lie against them. Their economic
4 interests are so aligned, they are regarded
5 as one entity and, therefore, when a parent
6 company tells a subsidiary to breach a
7 contract, if that were the case, that is not
8 deemed interference, tortious interference,
9 by the general rule.

10 There are numerous cases on this
11 subject, many of which have been cited to the
12 Court by both parties. One, I think, is
13 perhaps more instructive than most, and that
14 is the Second Circuit's decision in the
15 Boulevard case. In that case, applying
16 Connecticut law, the Court of Appeals
17 reversed a District Court ruling finding that
18 a corporate parent had tortiously interfered
19 with a subsidiary's contractual lease by
20 directing the subsidiary to stop paying rent.
21 In reversing, the Court noted that because of
22 the significant economic unity of interest
23 between a parent and a subsidiary -- and this
24 is a direct quote from the case -- "we do not
25 believe that such a shareholder can be

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2 considered a third party capable of
3 interfering with its own company's
4 contracts."

5 In the course of its opinion and
6 ruling, the Court of Appeals in Boulevard
7 collected and analyzed numerous cases from
8 other jurisdictions, including two from the
9 State of New York, all applying in varying
10 ways the general rule which precludes tort
11 liability on a corporate parent for
12 interfering with its subsidiary's contractual
13 relations. Here, we request that the Court
14 also apply that same general rule, and
15 dismiss Parus Holdings' tortious interference
16 claim against the Debtors.

17 Moving now to the deceptive trade
18 practice claim asserted by Parus Holdings, it
19 is a general --

20 JUDGE GONZALEZ: Before you
21 proceed, the calendar indicates that the
22 parties must have advised Debtors' counsel
23 when preparing the agenda that this would
24 conclude in 45 minutes.

25 MR. DRISCOLL: That was my

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2 estimate, Your Honor.

3 JUDGE GONZALEZ: All right. I
4 believe we started about five minutes late.

5 MR. DRISCOLL: Then I should wrap
6 up, shouldn't I?

7 JUDGE GONZALEZ: Yes.

8 MR. DRISCOLL: Then I will. For
9 the reasons stated in our moving papers, Your
10 Honor, I believe also the unfair deceptive
11 trade practice claim and the good faith and
12 fair dealing claim should be dismissed.

13 Thank you, Your Honor.

14 JUDGE GONZALEZ: All right. Thank
15 you.

16 MR. FRIEDMAN: Good afternoon. May
17 it please the Court, Robert Friedman from
18 Kelley Drye & Warren for Parus.

19 Your Honor, I think it is important
20 before we address the substance of the
21 summary judgment motion to place the Debtors'
22 motion in context. There has not been
23 discovery in this case. They are asking for
24 the extraordinary and unusual relief of
25 summary judgment before discovery, a motion

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2 which is in this Circuit, quote, unquote,
3 from the Diversified Carting case that we
4 cite, rarely granted. Not only do they seek
5 summary judgment prior to the completion of
6 discovery, not only have they failed to
7 produce entire categories of relevant hard
8 copy documents, not only have they not
9 produced any documents from the electronic
10 searches, but they failed to introduce any
11 evidence in a case in which it is
12 self-evident that there are inherently
13 factual questions on both the contract and
14 tort claims. I think it is important also
15 placing this in context.

16 If you look at the source of this
17 motion, our proof of claim was filed three
18 years ago. Our claims have not changed since
19 then. The timing has not changed. The
20 substance of the claims have not changed.
21 They did not make a Motion for Summary
22 Judgment at that time. A year and a half ago
23 in the summer of 2004, the claim objections
24 were fully briefed and submitted. At that
25 time, Your Honor, they did not make a summary

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judgment motion. They didn't tell the Court that they were purely legal claims here and that our legitimate claims could be dismissed outright. What happened was after the briefing on the claim objections a year and a half ago, we then pursued discovery in this case and, as the Court is aware, there has been a long and tortured history with respect to getting any documents from the Debtors. We had to make a motion to compel over the summer, and that is the first time, Your Honor, in which the summary judgment motion was raised. Their whole defense to our motion to compel, Your Honor, was: "Oh, now we are making a summary judgment motion, and there is an easy way out. We don't have to get into the Zubulake issues. We don't have to get into cost shifting. We don't have to get into a complex analysis of what was produced and not produced. Just dismiss the case or grant us the summary judgment motion on the nominal amount which they agree they owe us on an admitted breach of contract." Your Honor, the easy way out is not the

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2 proper way out and it is not the legal way
3 out in this case.

4 The Court is certainly aware of the
5 standard for summary judgment. We are
6 entitled to every single inference. When a
7 summary judgment motion is made prior to
8 completion of discovery, that deference is
9 magnified exponentially. I mentioned the
10 Diversified Carting case. We also cite the
11 Sanders case in which the Court said, if
12 there is even an expectation of material
13 evidence, that is enough to defeat a summary
14 judgment motion under Rule 56(f). We have
15 made a detailed specific showing, both from
16 an affidavit that I submitted and that
17 Mr. Reneau submitted, that there is a great
18 deal of material and relevant evidence that
19 has not been produced with respect to both
20 our contract and tort claims. These include
21 documents relating to the termination of our
22 product, the UC Contract communications
23 between WorldCom and Intermedia during the
24 relevant time period, which is prior to the
25 date of the merger, and documents relating to

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2 competitive products. It is our view
3 supported by evidence, which we have detailed
4 in these affidavits, and supported by
5 documentary evidence submitted, even prior to
6 discovery, Your Honor, that shows that
7 WorldCom prior to the merger had a
8 competitive product, and they had no
9 intention of going forward with our product.
10 It is conceded. It is not even disputed by
11 the Debtors. They intentionally took the
12 legs out of our product. Either they didn't
13 tell us while it was going on or Intermedia
14 didn't know about it, but whatever the case,
15 WorldCom is responsible for that. They had a
16 competitive product, and they tortiously
17 interfered, conspired, and unfairly took the
18 legs out of our contract. What the Debtors
19 do, Your Honor, is they essentially say --
20 and this is a quote from their brief -- all
21 of this evidence is, quote, unquote, properly
22 ignored. Well, under the law of this circuit
23 you can't properly ignore the evidence,
24 especially when we haven't had an opportunity
25 to complete discovery. Right now, for the

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2 first time, they have informed us, Your
3 Honor, that they are doing a search for the
4 electronically stored documents. That is
5 underway right now. In addition, we have now
6 received information with respect to a
7 privilege log in which they have withheld
8 documents that involve communications between
9 WorldCom and Intermedia prior to the merger.
10 There is absolutely no basis for them to
11 withhold these documents. We are waiting for
12 these electronic documents to be produced.
13 We are waiting for the documents from the
14 privilege log and we are waiting for the hard
15 copy documents. We don't have those yet.

16 Rule 56(f), Judge, is a strong
17 basis for this Court not even to entertain
18 this motion at this time. We are still
19 litigating the discovery. However, I want to
20 address the substantive claims in any event,
21 and I will start with the contract claim.
22 There are two sources of direct damages, two
23 types of direct damages that we are claiming
24 through the contract. One is the minimums,
25 called the Reconciliation Payments, which

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2 Mr. Driscoll referred to, and the other are
3 the benefit of the bargain damages. Make no
4 mistake about it. I believe, not
5 intentionally so, but there was some overlap
6 in Mr. Driscoll's presentation with respect
7 to the limitation of liability clause. We
8 address in our papers why that provision
9 should not be enforced, but I am not going to
10 address that here because I recognize there
11 is a concern on timing and we address it
12 sufficiently in our papers. The damages I am
13 going to talk about now are direct damages,
14 not consequential, the direct damages that we
15 are entitled to under the contract.

16 When Mr. Driscoll says that we have
17 a remedy under the contract, what he doesn't
18 say is the key provisions under the contract
19 sections 2.12 and 2.13, they don't say that
20 the reconciliation obligation stops at
21 termination. What they say and in reliance
22 of this we ramped up, which is specified in
23 the Taj Reneau affidavit, and we relied on
24 this provision in the contract, until
25 December of 2003, which is the 24 months that

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2 Mr. Driscoll referred to, they had a minimum
3 payment due to us. That is a clear
4 contractual obligation. What they are saying
5 now is because they didn't pay us and because
6 they stopped performance and because they
7 breached the contract, their obligation to
8 make that payment stops upon termination, and
9 that is just not the case. I am going to
10 even assume for this argument, Your Honor,
11 that they are right about Mr. McConnell's
12 submission with respect to the termination of
13 the contract, which we strongly dispute, and
14 I will address it in a moment. But even
15 assuming they are right, our claims had
16 accrued by their own admission in July of
17 2001. The timing is critical. There was no
18 termination until April of 2002. At that
19 time, under the definition of "accrual,"
20 which we set forth in our papers and the
21 principle anticipatory repudiation, they
22 become liable for all the minimums under the
23 contract. That is the way anticipatory
24 repudiation works. They are obligated to
25 give us minimums up through December of 2003.

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2 They tell us we are not performing, which
3 they did as of July of 2001. They
4 essentially shut down the contract. At that
5 point their contractual obligations can be
6 enforced at any time. Those claims have
7 accrued. We have cited several cases from
8 the Arizona Supreme Court, Gust, Rosenfeld,
9 which says claims accrue at the time you can
10 sue. When they told us that they weren't
11 going to perform, we could sue at that time.
12 The claims accrued. We also cite the Enyart
13 case, the Arizona Appeals Court decision, in
14 which despite the fact that there was no
15 obligation to pay at that point, as we had in
16 this case, the claims had accrued and their
17 obligations under the minimum, provisions
18 2.12 and 2.13, had accrued. They don't
19 address our accrual argument in their papers
20 and Mr. Driscoll didn't address it here.
21 They don't address our anticipatory
22 repudiation argument either. Under
23 anticipatory repudiation, as the Court is
24 aware, once a party indicates that it is not
25 going to perform, we are entitled to cease

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2 performance and enforce our claims under the
3 contract, even claims for which a payment
4 obligation had not been made yet, or under
5 the contract terms, a time had not come up.
6 What they say -- and by the way, we cite the
7 United California Bank case, another case
8 directly on point that says, if one party
9 indicates it will not perform, the breach is
10 committed at that time and the remedy
11 accrues, not for just their outstanding
12 invoices, but for what they obligated
13 themselves to under the contract, which is
14 the minimum payments. That is why we devoted
15 one-third of our entire company to this
16 product, which we set forth in the Reneau
17 affidavit. Their only response to this, Your
18 Honor, without citing any authority in their
19 reply, when we raise the anticipatory
20 repudiation and the accrual argument is,
21 well, you didn't elect your remedy properly.
22 They say, when we told you we weren't going
23 to perform, what you should have done is you
24 should have elected your remedy and sued us.
25 Well, the reason they cite no authority on

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2 that, Your Honor, is it is directly contrary
3 to Arizona law. There is an Arizona case
4 directly on point, in which this argument was
5 made by the breaching party, and the Supreme
6 Court of Arizona rejected it. That is the
7 case of Kammert Brothers v. Tanque Verde.
8 Now, that case is not in our papers, and I
9 want to put the citation on the record,
10 because this election argument was first
11 raised by Debtors in their reply papers, and
12 we, obviously, don't get a sur reply. The
13 cite of this case is 102 Ariz. 301, parallel
14 citation 428 P.2d 678. If the Court could
15 indulge me to read the relevant quotation in
16 this case. It alone is a basis to reject
17 their entire argument with respect to the
18 minimums. The Supreme Court said, quote, the
19 seller claims that there can be no
20 anticipatory repudiation here, since the
21 buyer failed to immediately treat the
22 repudiation as a breach and bring suit. We
23 believe that it is not necessary to say that
24 a breach is not an anticipatory breach until
25 it has been accepted as such by the injured

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2 party. A party that has received a definite
3 repudiation by the other party to the
4 contract should not be penalized for his
5 efforts to make the other party live up to
6 his end of the bargain and can cease urging
7 performance and bringing suit for the breach
8 at any time before the other party retracts
9 his repudiation. That is the law of
10 California. Under that law, Your Honor, the
11 minimums for the 24 months became accrued --

12 JUDGE GONZALEZ: That is a law of
13 California or Arizona?

14 MR. FRIEDMAN: I am sorry, Your
15 Honor. I was thinking of the United
16 California Bank case. It is in Arizona. I
17 apologize. Now, this is directly on point,
18 because that is exactly what happened here.
19 Mr. McConnell in his letters was seeking to
20 do exactly that, exactly what the Arizona
21 Supreme Court said you can do, which is try
22 to resolve the issue. They refused to pay
23 us. We sent a letter that says "pay us," and
24 we cited the provisions of the contract,
25 which Mr. Driscoll pointed out. But the

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2 McConnell letter also contains conditional
3 language, even beyond the anticipatory
4 repudiation point. Mr. McConnell explains in
5 his affidavit that his goal in sending this
6 letter was to get payment of the amounts due,
7 as the Court in Kammert said was permitted
8 under Arizona law. He says at various points
9 in both letters, which is not cited by the
10 Debtors, if there is a termination, we may
11 seek termination. Clearly, Your Honor, those
12 letters, which Mr. McConnell explains, are
13 not a basis to extricate Debtors from their
14 clear obligations under the contract.

15 In addition, Your Honor,
16 Mr. McConnell in his affidavit offers
17 uncontradicted evidence that the parties
18 after he sent the letter did not treat the
19 contract as terminated. He specifically
20 cites some discussions with Jeffrey Shu, a
21 WorldCom attorney. This is unrebutted. In
22 fact, the only response to this submission,
23 Your Honor, is a motion to strike this
24 evidence.

25 I just want to address very

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2 briefly, Your Honor, the pricing issue which
3 Mr. Driscoll discussed. Make no mistake
4 about it. The term "base monthly price" is
5 an undefined term. It is not defined
6 anywhere in the contract. This is
7 tailor-made for the introduction of evidence
8 to explain what the term means. "Base
9 monthly price" is not defined. Under the
10 decisions that we point out in response to
11 their motion to strike the Reneau affidavit,
12 Arizona law is very liberal with respect to
13 the introduction of evidence and the
14 consideration of evidence. If it doesn't
15 contradict the contract, it comes in and
16 should be considered. Here, Mr. Reneau
17 explains that the only price that was
18 negotiated was the unlimited price. "Base
19 monthly price" is a term of art. Basic
20 service and "base monthly price" are not
21 equivalent. Those are explained in the
22 affidavit. Should the parties have defined
23 the term "base monthly price"? Yes, they
24 should have. All of the accounts, I think
25 with the exception of one, were unlimited

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2 service.

3 As Mr. Reneau explains in his
4 affidavit, the basic service was simply a
5 fallback to do some sampling. If someone
6 wanted to sample the service, they could use
7 the basic service just to see what it is
8 like. Like if a salesmen goes out and says,
9 "Hey, do you want to try it for a week and
10 use the basic service?" Importantly also, as
11 explained in the Reneau affidavit, the basic
12 service came with additional costs. The
13 unlimited service, which was the base, as
14 Mr. Reneau explains, and which is a term of
15 art in the industry, was a fixed rate. It
16 was a fixed basic rate.

17 Your Honor, finally on the
18 contract, the Debtors misunderstand
19 apparently what our "benefit of bargain"
20 argument is. We are not seeking
21 consequential damages. Under Arizona law,
22 benefit of the bargain damages are direct
23 damages. We are seeking loss of value, which
24 the restatement, which Arizona follows,
25 directly distinguishes between consequential

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2 damages and benefit of the bargain damages.
3 This is an entirely separate category of our
4 claim. We are seeking the benefit of our
5 bargain, the loss of value of this contract
6 to us, and all the back-up evidence is
7 submitted, again, in the Reneau affidavit.
8 With respect to what we did, it is undisputed
9 by the Debtors.

10 Mr. Driscoll mentioned when he
11 concluded with respect to the contract
12 claims, that the argument that the Debtors
13 have made takes a tortuous path and, indeed,
14 I agree with him. In order for them to go
15 through all of the undefined terms without
16 any evidence, in order for them to say that
17 they should be extricated from clear
18 contractual obligations to pay the 24 months
19 or the minimum, I believe I agree with
20 them -- it is tortuous and it should be
21 denied.

22 With respect to the tort claims,
23 Your Honor, we have several different tort
24 claims. I recognize that we are running out
25 of time, so I will try to be brief. The most

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2 important issue with respect to their tort
3 claims in which the Court does not even have
4 to get into all of the issues with respect to
5 Copperweld, and the exceptions to the
6 privilege involve very simply this: prior to
7 January 1, 2001, these were not unified
8 entities. It is undisputed the bulk of our
9 tort claim, not all, but the bulk of our tort
10 claims, and our allegations relate to the
11 period from September 2000 to July 2001.
12 They simply have no basis to assert privilege
13 in this case, Your Honor, and they have no
14 response to this in their papers. Look
15 through their papers. You will see that
16 their only response is to say, "Well, yes,
17 you do allege that the allegations occurred
18 during that time period. But you know what?
19 That is just boilerplate, so we should just
20 ignore that." Even though, obviously, that
21 is essentially a 12(b)(6) motion that is
22 being decided on the pleadings, because we
23 haven't had the benefit of discovery. We
24 have alleged and we have shown very clearly
25 and specifically, as best we can with the

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2 limited discovery, that between September
3 2000 and July 2001 there was significant
4 evidence that WorldCom never intended to go
5 forward with this contract. Because of their
6 competitive product, they took the legs right
7 out of our own product. What they do, Judge,
8 is they say, "Well, you know what? We have
9 this Antitrust Order, and it is curious that
10 you didn't hear Mr. Driscoll mention the
11 Antitrust Order, because this was this whole
12 defense to our opposition." This was their
13 whole response to our opposition, when we
14 argued that it is a factual issue with
15 respect to an exception, the exception of
16 wrongful means. We showed that WorldCom used
17 wrongful means with respect to their conduct
18 on this contract. What they said was, "Hey,
19 listen, we have this Antitrust Order that
20 obligates us to divest of Intermedia."
21 Mr. Driscoll didn't mention this for several
22 reasons during his argument. Number one, the
23 Antitrust Order is extremely important,
24 because the language of the Antitrust Order
25 says that they are not to do anything to

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2 abrogate or hinder the contractual
3 relationships between Intermedia and its
4 contracting parties. They must divest of
5 these entities as a going concern. They
6 violated that. Not only did they violate our
7 rights, Your Honor, but they violated the
8 Antitrust Order. In addition, if you accept
9 that the Antitrust Order has any place as a
10 defense to our showing that they used
11 wrongful means, under the Antitrust Order
12 there is no unity of interest. They don't
13 have a privilege to begin with, because if
14 you look at the terms of the Antitrust Order,
15 it specifically says that WorldCom and
16 Intermedia are to be deemed separate
17 entities, competitive. This was a condition
18 put upon them by the Department of Justice.
19 They had no basis to assert a privilege under
20 the Antitrust Order.

21 Your Honor, I think it is
22 self-evident and I don't need to spend a lot
23 of time on the exception to the privilege
24 that they assert with respect to our tortious
25 interference and the conspiracy claim. We

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2 can show that it was not in the subsidiary's
3 interest. We can show wrongful means. The
4 cases hold conclusively that these are
5 fact-based considerations. We have received
6 no discovery. We have made a showing on the
7 limited discovery we have that is set forth
8 in our papers with respect to both the direct
9 and circumstantial evidence of both the
10 improper conduct, the wrongful means, and the
11 fact that this was not in Intermedia's
12 interest.

13 Your Honor, at best this motion is
14 premature, and at worse it is frivolous.
15 Either way, it should be denied.

16 JUDGE GONZALEZ: All right. Thank
17 you.

18 Mr. Driscoll, do you care to
19 respond?

20 MR. DRISCOLL: Very briefly. I
21 agree with counsel that the Court can look at
22 the pending motion as a motion brought under
23 12(b)(6) of the Federal Rules, the motion to
24 dismiss, and that it does not require
25 evidence outside for the matters that are

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2 before the Court at this point. Certainly
3 the contract speaks for itself and so on. I
4 do not think any further evidence is
5 required, so I agree.

6 Thank you, Your Honor.

7 JUDGE GONZALEZ: All right. Thank
8 you. I will take it under advisement.

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C E R T I F I C A T E

STATE OF NEW YORK)
 : SS:
COUNTY OF NEW YORK)

I, DEBORAH HUNTSMAN, a Shorthand
Reporter and Notary Public within and for the
State of New York, do hereby certify:

That the within is a true and
accurate transcript of the proceedings taken
on the 17th day of January, 2006.

I further certify that I am not
related by blood or marriage to any of the
parties and that I am not interested in the
outcome of this matter.

IN WITNESS WHEREOF, I have hereunto
set my hand this 20th day of January, 2006.

DEBORAH HUNTSMAN

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